90-406

Supreme Court, U.S.
FILED
SEP 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO_____

CURTIS L. WRENN
P. O. Box 203
Fort Drum, NY 13603,

Petitioner.

vs

RICHARD DROSKE, as Administrator to the Department of Veterans Affairs (as Chief and Individually), MURRAY A. MORPHY, Director of the Veterans Administration Medical Center (as Chief and Individually), PSYCHIATRY SERVICE DEPARTMENT OF VETERANS AFFAIRS' Medical Center, and the ATTORNEY GENERAL OF THE UNITED STATES DEPARTMENT OF JUSTICE,

Respondents.

PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court's decision to grant summary judgment to the employer was clearly erroneous and an abuse of discretion.

2. Whether the plaintiff presented a prima facie case of unlawful discrimination on the basis of age, race and retaliation, pursuant to the guidelines established by this Court in McDonnell Douglas Corp. v. Green , 411, U.S. 792, 802-05.

3. Whether the lower courts abused their discretion when they failed to give ANY consideration to the findings and recommendations of the EEO investigator.

4. Whether the defendants in this mixed-motive case presented admissible evidence to demonstrate conclusively that they were entitled to summary judgment in their favor.

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OPINIONS DELIVERED IN THE CASE

1. In response to the employer's vacancy announcement the petitioner submitted his application for the position of Administrative Officer, GS-341-9. The petitioner met the employer's stated qualifications, but despite his qualifications he was not interviewed nor was he hired. See Appendix H.

2. Believing he was denied employment because of his age, race and retaliation, on the basis that since 1970 he had been denied more than thirty positions by the VA, the petitioner filed a charge of unlawful employment discrimination Case Number 87-781 . The EEO investigator issued a recommendation of "a finding of race discrimination."

3. The petitioner filed a complaint in the district court (App E).

4. The petitioner's motion for summary judgment was denied, and the respondents cross-motion for summary judgment was granted. The district court's decision was appealed.

5. The court of appeals dismissed the appeal allegedly because it was without merit.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1254(1), 1651 and 1915. This Court is being asked to review the continuing actions by the Second Circuit Court of Appeals to deprive the petitioner of his civil, legal and constitutional rights.

Jurisdiction is also invoked under the Constitution and laws of the United States, including but not limited to the First and Fourteenth Amendments, Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act in that the decisions of the lower courts would deprive the petitioner of free speech, procedural due process and would deny him equal employment opportunity and access to information and/or documents under the Freedom of Information Act/Privacy Act.

The jurisdiction of this Court is also invoked to review the actions of the lower courts, in that they have rendered decisions which are contrary to decisions of this Court and the other courts of appeals.

This Court is being asked to review the decisions of the district court and the court of appeals, in that both courts have made decisions against the petitioner without considering the facts and applicable caselaw. If this decision is permitted to stand it will further encourage the VA and other public and private employers throughout America to continue their practice of denying the petitioner equal employment opportunity.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law ... abridging the freedom of speech ...; or the right of the people to peaceably ... to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

> Nor shall any person ... be deprived of life, liberty, or property, without due process of law ...

United States Constitution, Amendment XIV:

> Nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case concerns the petitioner's claims filed August 17, 1988 in which he alleged that he was denied equal employment opportunity, in violation of 29 USC 621 et seq, 42 USC 1981, 1983, 1985(3), and 2000e. The petitioner also alleged that the respondents had denied him documents and/or information under the FOIA (5 USC 552)

The essence of petitioner's claim is that despite his education, training and experience, the VA continues, continuing since at least November 1970, to deny him equal employment opportunity. In the case at bar the employer allegedly hired "a transfer eligible" despite the fact that the petitioner was rated as the most objectively qualified candidate for the position of Administrative Officer by the Office of Personnel Management (OPM). See App I and J.

The district court awarded summary

judgment to the respondents allegedly because they articulated a legitimate business reason for their hiring decision. That is, the petitioner allegedly failed to explain on his SF 171 that he had been fired by a previous employer. See App H-L.

The articulated reason for the petitioner's rejection by the counselor for the respondents was not supported by any admissible evidence. The petitioner submits that page four of his SF 171 (App N) clearly demonstrates that he explained the firing. Any allegation of any other SF 171 in the defendants' possession had to have been retrieved from one of his many prior applications for employment with the VA.

The petitioner, in his quest for employment with the VA, has submitted MANY SF 171s. However, to say that Respondent Morphy in 1989 reviewed petitioner's SF 171 and application for the position of

Administrative Officer is clearly a maliciously false statement. The facts clearly show that the plaintiff's application was returned to OPM in December 1986 (App H). OPM stated that the application file was destroyed 90 days after the employment rejection (App M).

The district court's decisions (App D-G) did not mention nor discuss how Morphy could review plaintiff's application in 1989 when OPM states the application was destroyed in 1987. More importantly, the district court did not mention what admissible evidenced it reviewed and/or considered in determining that the petitioner had failed to explain a firing.

The petitioner appealed the district court's decision. The court of appeals denied the appeal allegedly because it was without merit. The court did not explain how the case was without merit.

The petitioner brings this action to

this Court on the basis that the respondents did not prove conclusively and/or beyond a reasonable doubt their entitlement to summary judgment, and that the district court abused its discretion and that the decisins of the lower courts are clearly erroneous. See, e.g., Pullman-Standard v. Swint, 456 U.S. 273, 187-90, 102 S. Ct. 1781, 1789-91, 72 L.Ed.2d 66 (1982).

REASONS FOR GRANTING WRIT

ARGUMENT I - IMPORTANT PUBLIC CONCERN

1. This writ should be granted because of the enormous public concern regarding the implementation of The Equal Employment Opportunity Act of 1972. The petitioner's experience with the VA during almost twenty years of submitting applications for positions ranging from clerk-typist GS-4 to director of administation GS-15, is that there is NOT equal employment opportunity

for Negroid Americans. The petitioner and other similarly situated individuals have been denied employment despite their exceptional qualifications.

2. Moreover, the public has great concern regarding the fact that this is at least the second time the petitioner has been rated the top candidate for a position with the VA but was not hired.

ARGUMENT II ENTITLEMENT TO SUMMARY JUDGMENT NOT DEMONSTRTATED BY EMPLOYER

3. The admissible evidence presented by the plaintiff (App H-M) clearly demonstrated that he had been denied equal employment opportunity by the employer. A review of the record in this case will clearly demonstrate that the standards for granting summary judgment were not adhered to by the district court in this case.

4. All of the evidence before the court on a summary judgment motion must be construed in a light most favorable to the

non-moving party. Moreover, on a motion for summary judgment, the moving party bears the burden of proving conclusively that no genuine issue of material fact exists, and that the moving party is entitled to summary judgment as a matter of law. See, e.g., Smith v. Hudson, 600 F.2d 60 (6th Cir. 1979), cert. dismissed, 444 U.S. 986 (1979).

5. The most important material fact at issue in this case is why the petitioner was not given the same consideration as a "transfer eligible" (defined by OPM "Transfer means the noncompetitive employment of a career or career-conditional employee when he/she moves from one agency to another (with or without promotion) without a break in service of one full workday".) as the successful white applicant, who was not even rated by OPM (App I). The petitioner not only was a transfer eligible candidate, he was rated as

the top candidate for the position.

6. Accordingly, the inescapable fact is there was at least ONE triable issue before the district court. That is, why the petitioner was not given due consideration as a transfer eligible candidate. "The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court." See, e.g., Bell v. Cameron Meadows Land Co., (CA 9th Cir. 1982) 669 F.2d 1278; United States v. Articles of Device, 527 F.2d 1008, 1011 (6th Cir. 1976).

ARGUMENT III- EMPLOYER'S BURDEN UNDER TITLE VII WAS NOT MET

7. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. See, e.g., Texas Department of Community Affairs v.

Burdine, 450 U.S. 248, 252 (1981). See also, Grano v. Department of Development, 637 F.2d 1073, 1081-1082 (6th Cir. 1980).

8. The petitioner submits that he presented, by a preponderance of evidence a prima facie case of unlawful employment discrimination (App I and J). See McDonnell. The employer's articulated reasons for not hiring the petitioner (argument of defendants' counsel and the self-serving affidavit of Respondent Morphy (App L)) must be rejected because the explanations were mere pretext to mask their unlawful employment discrimination. Even if the defendants' articulation (the plaintiff did not explain his firing) is accepted, it must fail because the plaintiff submitted admissible evidence to clearly demonstrate that the defendants' stated reason was maliciously false (See App H, I, J, M and N). Moreover, the defendants articulated no reason for refusing to consider the

plaintiff as a transfer eligible candidate.

ARGUMENT IV - THE EMPLOYER DID NOT ADHERE TO FEDERAL HIRING PROCEDURES

9. OPM (5 CFR Ch. 1 (1-1-88 Edition) requires, pursuant to 300.602(b)(1):

> "(b) Advancement to positions at GS-6 through GS-11. An agency may advance an employee to a position at GS-6 through GS-11 only after he or she has served a minimum of-
> "(1) One year in a position two grades lower, when the position to which he or she is advanced is in a line of work properly classified at two-grade intervals;..."

10. The successful white candidate was employed as a GS-303 Medical Administrative Asst (GS-7). This position could not by any liberal interpretation be considered in the same line of work as GS-341 Administrative Officer. The district court nor the employer explained how, even if the successful candidate had the requisite articulated qualifications (which he did not), by law he could have been promoted from GS-303 (GS-7) to GS-341 (GS-9).

ARGUMENT V - EMPLOYER'S ARTICULATED BUSINESS REASON MUST FAIL

11. The employer has articulated two reasons for not hiring the petitioner. First, the successful candidate had computer and word processing experience (compare App J with K). The job description (App J) does not show computer and/or word processing as being required for the position of Administrative Officer. Thus the employer's articulated reason must fail primarily because "Failure to establish fixed or reasonably objective standards and procedures for hiring is a discriminatory practice in violation of 42 USC 2000e. See, e.g., Watson v. National Linen Service, 686 F.2d 877 (CA Fla 1982); Connecticut v. Teal, 102 S. Ct. 2525 (1982), 457 U.S. 440, 73 L.Ed. 2d 130.

12. The second "business reeason" offered by the employer is that the petitioner failed to explain a firing from a

previous job. That reason also must fail, in that the employer did not and indeed could not submit the plaintiff's application and/or SF 171 to support its stated reason. See App H, K-M.

13. The employer's articulated reason must also fail because the successful applicant did not meet the job requirements at App J. More specifically, the successful applicant did not meet the background requirements for the position, in that he did not demonstrate that he had a Master's Degree or its equivalent in Health Care Administration, had no previous experience working in a psychiatry environment in an acute care hospital, but more importantly had no previous experience in the GS-341 job series.

14. Because the successful white applicant did not meet the objective requirements of the position of administrative officer, the subjectively based

employment decision to hire him should not be condoned by this Court. See, e.g., Brady v. Thurston Motor Lines, 726 F.2d 136 (4th Cir. 1984).

15. Accordingly, the employer in this "mixed motive" case (legitimate business necessity vs. illegitimate hiring procedures) has not proven by a preponderance of the evidence that it would have made the same decision even if the petitioner was of a different race (i.e. white) or age (under age 50). See, e.g., Price Waterhouse v. Ann B Hopkins, cert. to U.S. CA DC Cir., Case No 87-1167, May 1, 1989, 57 LW 4470, 4473.

ARGUMENT VI - JURISDICTIONAL REQUIREMENTS OF FOIA/PRIVACY

16. A central issue in this case is whether the district court had jurisdiction to decide "de novo" the petitioner's FOIA/Privacy Act claims. The facts in this case indicate that the district court had

but did not exercise its jurisdiction after the petitioner exhausted the required administrative procedures, in that he filed timely requests for documents and/or information and was denied such.

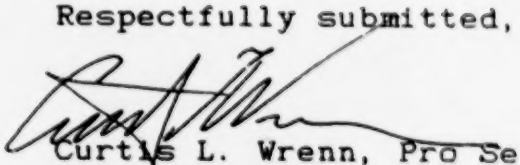
17. A writ of certiorari is warranted in this case because of the irreparable harm to the petitioner resulting from the respondents' continuing efforts to stigmatize and defame him, and their continuing efforts to deny him equal employment opportunity, and an attempt to cover up their activities by denying him documents and information under the FOIA.

18. The denial of information under the FOIA, without a de novo hearing and/or trial, is contrary to this Court's decision in U.S. Dept. of Justice v. Reporters, Cert. to CA DC, Sup Ct Case No 87-1379 (1989).

CONCLUSION

Based upon the foregoing, this case should be remanded to the lower courts for trial on the merits.

Respectfully submitted,



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO_____

CURTIS L. WRENN
P. O. Box 203
Fort Drum, NY 13603,

Petitioner.

vs

RICHARD DROSKE, as Administrator to the department of Veterans Affairs (as Chief and Individually), MURRAY A. MORPHY, Director of the Veterans Administration Medical Center (as Chief and Individually), PSYCHIATRY SERVICE DEPARTMENT OF VETERANS AFFAIRS' Medical Center, and the ATTORNEY GENERAL OF THE UNITED STATES DEPARTMENT OF JUSTICE,

Respondents.

PETITIONER'S APPENDIXES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A
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United States Court of Appeals

For The

Second Circuit

NDNY
88-CV-872
McCURN

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of August, one thousand nine hundred and ninety

---

CURTIS L. WRENN,

Plaintiff-Appellant,

-V-

DOCKET NUMBER
90-6019

RICHARD DROSKE, as Administrator to the Veterans Administration (as Chief and individually), MURRAY A. MORPHY, Director of the Veterans Administration Medical Center (as Chief and individually), PSYCHIATRY SERVICE VETERANS ADMINISTRATION MEDICAL CENTER, and the ATTORNEY GENERAL OF THE UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant WRENN.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/
ELAINE B. GOLDSMITH
Clerk

NDNY
88 CV 872
MCCURN(0608)

WF

United States Court of Appeals

For The

Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of June, one thousand nine hundred and ninety.

PRESENT:

HONORABLE WILFRED FEINBERG

HONORABLE JON O. NEWMAN

HONORABLE RICHARD J. CARDAMONE
Circuit Judges

----------X

CURTIS L. WRENN,

Plaintiff-Appellant,

- against - 90-6019

RICHARD DROSKE, et al.,

Defendants-Appellees.

----------X

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was taken on submission.

UPON CONSIDERATION WHEREOF, it is hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED.

ISSUED AS MANDATE. Aug 14, 1990

UNITES STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CURTIS L. WRENN,

Appellant,

vs Docket No 90-6019

RICHARD DROSKE, et al.,

Appellees.

PETITION FOR REHEARING IN BANC

COMES NOW THE APPELLANT to petition the entire Court and requests that the Order of June 6, 1990 be reconsidered. The grounds for rehearing are:

1. The court has misapprehended the facts and/or misapplied the law and rendered a decision contrary to the facts in the case. More importantly, the decision of the court is contrary to previous decisions of this court, the other circuits and the Supreme Court.

2. The primary error in this case is that the court has accepted the "argument" of the counsel for the defendants as refuting the appellant's claim that he was unlawfully denied employment. Such

acceptance is contrary to the Supreme Court's holding in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) where the Court held "An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel."

REASON FOR GRANTING REHEARING

1. The court apparently overlooked page 5 of the Minutes of Proceeding held on October 10, 1989, where the defendants states "... that Dan Brown had significant computer and word processing experience and ability." It is unrefuted that this was not one of the requirements listed by the employer NOR was it part of the job description. Also page 9 where the defendants states: "... Dr. Morphy's testimony before the investigator was he didn't recall this plaintiff at all, didn't recall his qualifications and so didn't recall what it is about him that might lead him to reject him. ... when he (Dr Morphy) was interviewed by the V.A. counsel in preparation for responding in this case, he had a chance to review

that SF-171, the plaintiff application, and when he did, his recollection was refreshed as to what the basis of his reasons for rejecting this particular plaintiff was."

2. The facts in the case clearly demonstrate that the statement "to review that SF-171, the plaintiff's application" is totally false in that (1) Dr. Morphy stated earlier that the application was returned to OPM as is required by that federal agency, and (2) OPM stated the SF-171 and application submitted by the plaintiff were destroyed 90 days after being submitted. Thus there was absolutely no way for Dr. Morphy to review the SF-171 submitted as application for the position of Administrative Officer. Any SF-171 reviewed by him of Curtis L. Wrenn had to be one submitted in connection with one of the more than 30 other jobs which the plaintiff applied for with the VA.

3. Since filing this appeal, the appellant has received from an anonymous source evidence (Exhibit 1) which demonstrates that the counsel for the defendants knew or should have known false and/or

misleading information was resented to the district court. Moreover, the counsel for the defendants knew and/or should have known that 91) the employer did not have the SF-171 which the plaintiff submitted in conjunction with the position at issue, (2) that the employer had altered and/or changed the job requirements without informing the appellant to justify hiring the white applicant, and (3) the counsel was acutely aware of the possible perjury committed by Dr. Morphy. Thus the court should impose maximum Rule 11 sanctions on the defendants for knowingly misleading the courts.

4. Furthermore, even if this court were to determine that this issue (Ex 1) had not been raised in the district court, consideration thereof on appeal is proper.

> We are aware of the rule that a federal appellate court does not generally consider an issue not passed upon by the lower court. Singleton v. Wulff, 428 U.S. 106, 120, 96 S. Ct 2868, 49 L.E.2d 826 91976). Equally well recognized is the doctrine that where injustice might otherwise result, such an unraised issue will be considered. Hormal v. Helvering, 312 U.S. 552, 556, 61 s. Ct. 719, 85 L.E.2d 1037 (1941); United States v. Tanks, 464 F.2d 547, 548 (CA 9 1972).

Roberts v. Hollandsworth, 582 F.2d 496, 499-500 (9th Cir., 1978). Accord, United States v. Vater, 259 F.2d 667, 673 (2nd Cir. 1958). See, also, Kinedy v. Silas Mason Co., 334 U.S. 249, 254-256, 68 S. Ct. 103, 92 L.E. 1347 (1948) where the Supreme Court vacated the summary judgment granted even where that determination on appeal was based in part upon argument predicated upon legal theories advanced for the first time on appeal.

5. This is a mixed-motive case involving the appellant claims based on race, age and retaliation discrimination. He met the requirements of a prima face disparage treatment employment discrimination case by showing that there was a vacant position, he made application for the position, the selection of a person of another race and possession by him of the necessary qualifications for appointment. Walker v. Jefferson County Home (CA Ala 1984), 726 F.2d 1554.

6. The employer submitted an unsupported argument that the plaintiff was denied employment because he omitted a firing from his SF-171. The

alleged SF-171 was not submitted, and therefore the argument must fail. Burdine, supra. Moreover, the employer's allegation was merely a pretext for discrimination. See, e.g., EEOC v. Inland Marine Industries, (CA Cal 1984), 729 F.2d 1229.

7. The McDonnel Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 91973) decision should have been used as the appropriate method for examining the appellant's prima facie case allegation, in that discrimination must be inferred from the circumstantial evidence which demonstrates that more likely than not the employer used impermissible factors to deny the appellant employment and to hire an unqualified white person. See, e.g. Lewis v. Smith (CA Fla 1984) 731 F.2d 1535.

8. In the case at bar the employer has not met its burden (Burdine, supra) by demonstrating by a preponderance of evidence that the plaintiff was denied employment for a legitimate reason. See, e.g., Gilchrist v. Bolger (CA Ga 1984), 733 F.2d 1551. Moreover, the employer primary burden was not

met, in that the explanation of its reasons for its action against the plaintiff must be clear and reasonably specific to rebut the plaintiff's prima facie case. A review of the record will show that the district court drew the wrong conclusions from the "arguments" of the counsel for the appellees, in that the arguments were not evidence. See, e.g., Johnson v. Allyn & Bacon, Inc. (CA Mass 1984), 731 F.2d 64. There was no admissible evidence entered in the case to support the employer's allegation that appellant's SF 171 did not show a previous firing.

9. Finally the district court committed a reversible error when it accepted the job qualifications "argued" by the appellees. The appellees submitted no evidence to support its alleged job qualifications requirements. To the extent that job qualifications are not manifest as a matter of law, it is the employer's burden to show need for those qualifications. Domingo v. New England Fish Co., 727 F.2d 1429, (CA WA 1984). More importantly, "An employer may not, in other words,

prevail in a mixed-motive case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." Waterhouse v. Hopkins, 57 LW 4476. Volume 57, No 42, (1989). WHEREFORE, appellant prays that the court will reconsider its decision, and will remand this case to the district court for a proper hearing.

Respectfully submitted,

/s/
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Tel: (315) 772-7817

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to Paula Ryan Conan 100 S. Clinton St., Syracuse, NY Jun 18, 1990.

/s/
Curtis L. Wrenn

TO : PRC

FROM : Mary Reagan

DATE : 9/22/89

RE : Reactions to Motion for Summary Judgment Papers in Curtis Wrenn v. U.S. et al.

Curtis Wrenn does not respond to the Government's Cross-Motion regarding the burden to prove a prima facie case of employment discrimination based upon race. Wrenn keeps asserting that the Government's claim that they desired a person knowledgeable in computerized technology is not valid because such a desire was not published. Wrenn does not provide any other substantively specific information or allegations.

The only evidence of impropriety that may exist is that Mr. Morphy, even after interview Mr. Brown, actually looked at the five names and applications received from OPM. If Morphy was in fact satisfied with Brown's qualifications, then why did he continue looking? This could cause a problem because Morphy may have made himself obligated to more thoroughly review the five additional

candidates.

> NOTE [Morphy received the OPM with Brown on it on Dec. 10, 1986 and 'immediately' interviewed Brown. Was that interview on Dec. 10, 1986? Then, on Dec. 11, 1986 the new OPM arrived with 5 additional names on it.]

Wrenn also asserts in his response that Morphy's explanation about Wrenn not explaining an answer to a question that he had been fired, is Morphy's "latest" argument. This assertion implies that the United States may have added this argument at a later date. I don't know if this is true, but if it is a new argument, would it even make a difference?

Wrenn attacks the promotion procedure of Brown's employment and he asserts that Brown did not meet the background requirements for the job. I would question Whether or not the promotion procedures are even relevant. Arguably, Morphy may have been able to disregard how or why a person is promoted because he is looking at candidates from a hiring point of view. He is looking for a qualified candidate who may or may not be in the grade level immediately below the level of the job sought.

Wrenn also accuses the government of disregarding

the OPM rating system. he asserts, without specific examples, that Brown's qualifications were not supported by the evidence. he also concludes that the other candidates were qualified. They possessed similar knowledge and skills according to their resumes and applications. The court should take into account, even if it turns out that all candidates were similarly qualified, that Brown was interviewed and the rest of the candidates were not. Morphy should not be required to make a wholly "paper" decision nor should he be required to lengthen the time and increase the cost of hiring new employees when he has already found someone he wishes to hire.

Wrenn believe that Morphy never reviewed his SF 171, when in fact there is evidence that Morphy reviewed the five additional resumes and applications, including the SF 171. He was able to make a decision that it would not be worth his while to interview any of these candidates.

Wrenn also implies that it would have been impossible for Brown to have been employed at a

nearly identical capacity at Griffiths Air Force Base because the Air Force base does not have a psychiatric unit that is medical school affiliated. I am unfamiliar as to the actual job that was available, but there is no reason that a person in a similar job exercising similar skills could not apply those skills to another job. "Nearly identical capacity" does not necessarily mean that the jobs were identical in all aspects. Wrenn is taking the statement too literally and accusing Morphy of giving Brown more credit for his former experience than he is actually due.

The argument that Morphy did not even know Wrenn was black when re read the application is said to be irrelevant by Wrenn. Discrimination is when <u>any</u> individual is denied equal opportunity employment regardless of race, according to Wrenn. Wrenn contradicts his entire claim because one of his main points is that he was discriminated against due to his race. Morphy should not be precluded from explaining or offering a defense in regards to the racial claim.

Wrenn continuously concludes that a discriminatory reason more likely than not motivated the employer in making his decision. After reading the Government's cross-motion for summary judgment and the plaintiff's response to the motion, I can see why the government is having difficulty in disposing of Wrenn's claim. This problem does not arise because the government has discriminatory hiring practices, but rather because Wrenn has not been specific in his accusations. he makes broad allegations and generalizations about the hiring practices of the VA without providing specific instances of conduct that would illustrate a blatant or even a subtle act of discrimination.

APPENDIX D
Page 1 of 8 Pages

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CURTIS L. WRENN,

Plaintiff-Appellant,

vs

Docket No
90-6019

RICHARD DROSKE, as Administrator to the Veterans Administration (as Chief and individually), MURRAY A. MORPHY, Director of the Veterans Administration Medical Center (as Chief and individually), PSYCHIATRY SERVICE VETERANS ADMINISTRATION MEDICAL CENTER, and the ATTORNEY GENERAL OF THE UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees.

PLAINTIFF-APPELLANT'S APPEAL MEMORANDUM

COMES NOW THE PLAINTIFF-APPELLANT and appeals the decision of the United States District Court for the Northern District of New York of December 22, 1989. This memorandum of appeals is made on the basis that the district court (1) abused its discretion, (2) misinterpreted the facts in this case, (3) misapplied the laws governing federal employment, and (4) misapplied the laws governing unlawful

employment practices. A memorandum in support is submitted.

Respectfully submitted,

/s/
Curtis L. Wrenn, Pro Se

MEMORANDUM IN SUPPORT

I. BACKGROUND:

1. This case concerns the appellant's allegation that the respondents, since at least 1980, have denied him employment in his chosen profession of hospital and health care administration. Appellant has alleged that he was denied employment because of his race (Negroid) and/or his age (date of birth February 14, 1930) and/or retaliation (because of his previous opposition to respondents' unlawful employment practices).

2. The facts in the case are:

a. The appellant, in response to the respondents' vacancy announcement, submitted his application for the position of Administrative Officer GS-9. The appellant met the stated requirements for the position, but despite his qualifications he was not hired. A younger less qualified caucasian was hired. Believing the hiring was based on impermissible factors, the appellant filed an administrative charge of discrimination. The EEO investigator recommended "a finding of race

discrimination." See Ex 3.

b. Respondent Morphy alleged that the person hired had "computer based technologies such as word processing, ...". See Ex 4, page 32. Almost two years later Morphy stated that the reason the appellant was not hired was because he did not explain a firing and that there were gaps in his employment. See Ex 5.

c. The appellant maintains that the respondents' stated reason for rejecting his application was a mere pretext to mask their continuing unlawful discrimination visited upon him since 1980. In support, the appellant submits Exhibits 6 (EEO investigator's report). 7 (Position Description for Administrative Officer; no indications whatsoever that computer and/or word processing experience is required), 8 (page 8 of the VAMC Center Memorandum No 05-37, August 23, 1985; where the employer states "All candidates . . . must meet the minimum requirements of qualification standards established for the position by the VA or OPM ...), 9 (the SF 171 of the successful applicant

(Daniel J. Brown); his application clearly demonstrates that he did not meet the requirements for the position), 10 (the appellant's qualifications), and 12 (letter from the Office of Personnel management dated November 22, 1989; this letter clearly demonstrates that Respondent Morphy's affidavit at Ex 5 is false, in that he could not have on May 3, 1989 reviewed the appellant's SF 171 because it had been destroyed around March of 1987 or 90 days after the appellant's application was rejected: see page 1 of Ex 3).

II. REASONS FOR GRANTING THE APPEAL:

1. Appellant's core grievance is that he is a victim of the respondents continuing acts of unlawful employment practices, in violation of The Equal Employment Opportunity Act of 1972. That is, the appellant applied for a position which the employer was seeking applicants with his qualifications, he met the stated requirements, but despite his qualifications he was denied employment.

2. The seminal decision on the elements of a prima facie case of discrimination on the basis of

non-hire is McDonnell-Douglas Corp. v. Green, 411 U.S., 792, 802 (1973);

> "(i) that (plaintiff) belongs to a racial minority; (ii) that he applied and was qualified for a job which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that after his rejected the position remained open and the employer continued to seek applicants from persons of complainant's qualifications:

See also, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

3. The appellees have not articulated a legitimate non-discriminatory reason for denying the appellant employment. The reasons offered by the appellees (Exhibits 4 and 5) must fail, in that the employer has offered at least two unsupported explanations for rejecting the appellant's application. Thus the appellees have not met their Burdine requirement, in that they have not presented any admissible evidence to demonstrate a "reasonably

specific reason" for not hiring the appellant.

4. Two further observation should be made regarding this case, namely the district court's refusal to grant any weight to the findings of the EEO investigator and that court's refusal to respond to the (Plaintiff's) Request for Court Opinion/Ruling which was filed on or about may 9, 1989.

5. Based on the foregoing, the appellant submits that the district court abused its discretion in granting summary judgment to the employer in this case. Moreover, the court misapprehended the facts and misapplied the laws governing federal employment and/or employment discrimination.

Respectfully submitted,

/s/
Curtis L. Wrenn, Pro Se
P.O. Box 203
Fort Drum, NY 13603
Tel: (315) 772-7817

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to Paula Ryan Conan, Esq., 100 S. Clinton St.,

Syracuse, NY 13260 on March 13, 1990, via U. S. mail, postage prepaid.

/s/Curtis L. Wrenn

APPENDIX E
Page 1 of 11 Pages

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CURTIS L. WRENN,
P. O. Box 1691
Albany, NY 12201,

COMPLAINT WITH
JURY DEMAND

Plaintiff,

vs

ADMINISTRATOR
VETERANS ADMINISTRATION
810 Vermont Avenue, N.W.
Washington, D. C. 20430

-AND-

RICHARD S. DROSKE, DIRECTOR
VETERANS ADMINISTRATION MEDICAL CENTER
3495 Bailey Avenue
Buffalo, NY 14215

-AND-

MURRAY A. MORPHY, INDIVIDUALLY AND
AS CHEIF, PSYCHIATRY SERVICE
VETERANS ADMINISTRATION MEDICAL CENTER
3495 Bailey Avenue
Buffalo, NY 14215

-AND-

THE ATTORNEY GENERAL OF
THE UNITED STATES
DEPARTMENT OF JUSTICE
10th and Pennsylvania Avenue, NW
Washington, D. C. 20530

Defendants.

1. The jurisdiction of this Court is invoked pursuant to the provisions of 28 USC 1343(4), this being an action in equity and a suit authorized by law to be commenced by any person to recover damages for injury and to secure other forms of relief under acts of Congress providing for the protection of civil and legal rights.

2. The jurisdiction of this Court is also invoked pursuant to 28 USC 1331, this being a civil action wherein the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000.00), exclusive of interests and costs, and arises under the Constitution and laws of the United States. In addition, the jurisdiction of this Court is invoked pursuant to 5 USC 552, this being an action in which agents, employees and officials of the U. S. Department of Justice and the Veterans Administration, including but not limited to the officials named above, have conspired to defame, libel and slander the plaintiff, and have attempted to cover up their activities by, among other things, denying the plaintiff information under the Freedom

of Information Act. Such information is pertinent to plaintiff's attempts to demonstrate a conspiracy by the defendants to deprive him of rights, privileges and immunities secured by the Constitution and laws of the United States, including but not limited to the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. The plaintiff has attempted, without success, to exhaust the required administrative remedies of the FOIA (5 USC 552). See Exhibit #4.

3. The jurisdiction of this Court is also invoked pursuant to 42 USC 1981, this being an action brought by a black citizen who has been denied the right to make and enforce contracts and the right to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, specifically with respect of contracts, compensations, terms, conditions and privileges of employment.

4. The jurisdiction of this Court is also invoked pursuant to 42 USC 1985(3), this being an

action brought by a Black citizen against the Veterans Administration for intentionally and maliciously conspiring since at least 1980 to deprive the plaintiff of his civil legal and constitutional rights. Such actions and conduct as herein complained of subjected the plaintiff to the deprivation of rights, privileges and immunities secured to all by the Constitution and laws of the United States, including but not limited to the First and Fourteenth Amendments, and Title VII of the Civil Rights Act of 1964.

5. The jurisdiction of this Court is also invoked pursuant to 42 USC 2000e et seq., providing for injunctive and other relief against discrimination in employment on the basis of race, religion, sex and national origin; and on the basis of retaliation, for the plaintiff's previous opposition to employment practices which were made unlawful by the constitution and laws of the United States.

6. The jurisdiction of this Court is also invoked pursuant to 29 USC 621 et seq., providing

for injunctive and other relief against discrimination in employment on the basis of age.

7. The plaintiff, Curtis L. Wrenn, is a Black male resident of Rensselaer County, New York, and whose date of birth if February 14, 1930. Plaintiff is a well qualified hospital and health care administrator on the basis of academic studies, training and experience in his chosen profession.

8. In early 1986 the plaintiff, in response to a Vacancy Announcement published by the U. S. Office of Personnel Management, submitted his application for consideration for the position of Administrative Officer GS-9. The plaintiff met the stated qualifications, but despite his qualifications he was not hired. The plaintiff filed an administrative charge of unlawful employment discrimination with the VA. The EEO investigator rendered a finding that the plaintiff had been denied employment because of his race, in that a younger white person with less experience and education was hired. See Exhibit #1.

9. The plaintiff filed his first charge of

employment discrimination against the VA in early 1981 for the failure to hire him for the position of Director, Medical Administration Service GS-15. The EEO investigator determined that that hiring decision was also racially motivated. See Exhibit #2.

10. Since 1981 the plaintiff has been denied equal employment opportunity by EVERY VA Medical Center and Office which he had made application.

11. The plaintiff has exhausted the required administrative remedies of Title VII and the ADEA, in that on or about June 27, 1987 he filed a formal charge with the VA, in which he alleged that he had been denied equal employment opportunity because of his race (Negroid), age (date of birth February 14, 1930) and retaliation (for his previous opposition to unlawful employment practices).

12. Based upon the foregoing, plaintiff submits that since at lease December 19, 1980 (Exhibit #2, page 1) and continuing up to at least the present time (Exhibits 1 and 3), he will be denied equal employment opportunity by officials, agents and

employees of the Veteran Administration, because of his age and/or race and/or retaliation, in violation of 42 USC 2000e and 29 USC 621 et seq.

FIRST CLAIM:

13. The allegations contained in the foregoing paragraphs one (1) through twelve (12) are incorporated herein expressly by reference.

14. The plaintiff submitted an application for employment, in response to the defendants' vacancy announcement that it was accepting applications for employment from individuals with his qualifications. Plaintiff was not hired. The decision not to hire plaintiff, as alleged hereintofore, was based upon the defendants intentionally retaliating against him for having previously filed "charges" with the EEOC and lawsuits in the federal courts alleging unlawful employment discrimination. The defendants' action herein are violative of Section 704(a) of The EEOC Act (42 USC 2000e-3(a)) and the ADEA (29 USC 621).

15. As a direct and proximate result of those actions and conduct by the defendants, the plaintiff has and will continue to suffer severe and intense

emotional distress, mental anguish, humiliation, embarrassment and loss of income and has and in the future will continue to incur expenses and legal fees in order to ensure the vindication of his legal rights.

SECOND CLAIM:

16. The allegations of law and fact set forth in the foregoing paragraphs one (1) through fifteen (15) are incorporated herein expressly by reference.

17. The defendants' decision not to hire plaintiff as alleged hereintofore constitutes an intentional violation of plaintiff's rights, privileges and immunities under the Constitution and laws of the United States, including but not limited to the First and Fourteenth Amendments, and 42 USC 1981, 1985(3) and 2000e. The defendants actions were racially motivated (see Exhibits 1 and 2).

18. As a direct and proximate result of those actions and conduct on the part of the defendants, plaintiff has and will continue to suffer sever and intense emotional distress, mental anguish, humiliation, embarrassment and loss of income and

has and in the future will continue to incur expenses and legal fees in order to ensure the vindication of his legal rights.

THIRD CLAIM:

19. The allegations of law and fact contained in the foregoing paragraphs one (1) through eighteen (18) are incorporated herein expressly by reference.

20. The person hired by the defendants was a younger (under age 40) white male with less experience and education than the plaintiff (pages 11 and 12 of Exhibit #1). The decision not to hire the plaintiff, as alleged hereintofore, was based upon the defendants intentionally discriminating against the him because of his age and his previous opposition to employment practices made unlawful by the Constitution and laws of the United States, including but not limited to Title VII and the ADEA.

FOURTH CLAIM:

21. The allegations of law and fact contained in the foregoing paragraphs one (1) through twenty(20) are incorporated herein expressly by reference.

22. The Defendants VA and Justice have conspired

to prevent plaintiff's employment in his chosen profession of hospital and health care administration by, among other things, aiding and abetting public and private employers who have discriminated against him, and by concerted action to defame, libel, slander, and stigmatize the plaintiff by making false and misleading statements to others about him. In an attempt to cover up their unlawful activities, the defendants have denied information to the plaintiff under the FOIA (5 USC 552).

WHEREFORE, plaintiff demands judgment as follows:

1. Award him back pay, benefits and other compensatory damages in the sum of five hundred thousand dollars ($500,000.00).

2. Award him punitive damages in the amount of one million dollars ($1,000,000.00) for the defendants' continuing actions and conduct to deny equal employment opportunity to the plaintiff.

3. Award him his reasonable administrative and legal expenses.

4. Award him his reasonable costs and other

related expenses for prosecuting this action.

5. Direct the defendants to provide any and all information requested by the plaintiff under the FOIA.

6. Grant him such other and further relief as may be deemed just by the Court.

Respectfully submitted,

/s/
Curtis L. Wrenn, Pro Se
P.O. Box 1691
Albany, NY 12201
Tel: (518) 477-2508

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CURTIS L. WRENN,

Plaintiff,

-v- 88-CV-872

RICHARD DROSKE, as Administrator to the Veterans Administration (as Chief and individually), MURRAY A. MORPHY, Director of the Veterans Administration Medical Center (as Chief and individually), PSYCHIATRY SERVICE VETERANS ADMINISTRATION MEDICAL CENTER, and the ATTORNEY GENERAL OF THE UNITED STATES DEPARTMENT OF JUSTICE,

Defendants.

APPEARANCES: OF COUNSEL:

CURTIS L. WRENN
Plaintiff, Pro Se
P.O. Box 203
Fort Drum, NY 13603

FREDERICK J. SCULLIN, JR.
United States Attorney
Attorney for Defendants
369 Federal Building
Syracuse, NY 13260

JAMES C. WOODS
Asst. U.S. Attorney

NEAL P. McCURN, C.J.

MEMORANDUM-DECISION AND ORDER

BACKGROUND

In 1986, Curtis L. Wrenn applied for the position of Administrative Officer with the Psychiatry Service at the Veterans Administration Medical Center (V.A.M.C.) in Buffalo, New York, a GS-9 position. This vacancy was included in an open, continuous announcement of vacancies issued for employees at the V.A.M.C. at Buffalo on April 1, 1986. On August 25, 1986, Murray A. Morphy, Chief of the Psychiatry Service at the V.A.M.C. and the official charged with filling the vacancy, received a certificate or eligible candidates from the personnel office of the V.A.M.C. The certificate listed five candidates, however the plaintiff's name was not among them. Finding none of these five candidates qualified, Murphy so informed the V.A.M.C. personnel department on September 8, 1986, and requested an additional list.

On December 10, 1986, the Syracuse Office of Personnel management provided Morphy with another certificate of transfer eligible employees. This certificate listed only one name, that of a 31-year

old white male, Daniel J. Brown. Morphy immediately reviewed Brown's qualifications, conducted an interview, and determined that Brown was qualified for the position.[1]

On December 11, 1986, Morphy received a list of five other transfer eligible candidates. This list contained the name of plaintiff Wrenn. Morphy scanned this new list to determine if there was a superior candidate. Seeing none, he conducted no further interviews, and hired the 31-year old Brown on December 19, 1986.

The plaintiff applied for this position on an SF-171 application. This form inquires as to whether the applicant had been fired from any job within five years prior to the filing of the application. if the candidate had been fired, the applicant is to

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[1] Affidavit of Murray A. Morphy ("Morphy Affidavit"), 5/31/89, paragraph 6.

explain why he was fired on the application.[2] Wrenn stated on this form that he had been fired, but gave no reason for the firing. As a result, even though the plaintiff was admittedly the highest rated applicant for the position, it was Morphy's judgment that the application "presented significant gaps in his employment picture", and he accordingly ruled out any further consideration of his application on that basis.[3]

Upon learning that the position for which Wrenn had applied had been filled by a younger, white male, Wrenn commenced the instant action against the defendants. Wrenn's lawsuit asserts a number of different causes of action, including allegations of racial and age discrimination; a conspiracy between the defendants to violate Wrenn's constitutional

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[2] The application states:

> a conviction or a firing does not necessarily mean you cannot be appointed. The nature of the conviction or firing and how long ago it occurred is important. Give all the facts so that a decision can be made (emphasis is added).

[3] Morphy Affidavit, paragraph 9.

rights; and a claim wherein Wrenn states that the defendants did not hire him for the position in retaliation for his previous filings with the Equa Employment Opportunity Commission ("E.E.O.C.").

In his affidavit, Morphy states that he was not aware of the plaintiff's race until the plaintiff filed an administrative complaint, and that any knowledge he had about Wrenn's age played no role his hiring decision.[4]

An investigative report by the E.E.O.C. recommended a finding of race discrimination, but found no discrimination on the basis of age or reprisal.

On October 12, 1989 this court, by Memorandum-Decision and Order, denied plaintiff Wrenn's motio for summary judgment and granted the defendants' cross-motion for summary judgment.

On October 23, 1989, Wrenn filed a motion for leave to file supplemental pleadings, and on Octob 25, 1989, the plaintiff filed a motion for reconsideration of the instant case.

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[4] Morphy Affidavit, paragraph 10.

DISCUSSION

1. The motion to file supplemental pleadings.

Wrenn's motion to file supplemental pleadings was filed after the court's order dismissing the complaint herein. There are no longer any pleadings to supplement, and therefore his motion to file supplemental pleadings is untimely.

2. The motion for re-consideration.

In his motion for reconsideration the plaintiff argues, inter alia, that (a) "the defendants should not have been heard because, among other things, [the motion] was not filed twenty-one days prior to the date it was heard"[5] (b) "the facts before the Court clearly demonstrate that [the successful candidate] did not meet even the minimum qualifications for the position",[6] and (c) the employer failed to articulate the "real reason for its failure to hire the plaintiff."[7]

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[5] Plaintiff's memorandum in support of his motion for reconsideration, p. 2.

[6] Id.

[7] Id.

None of these arguments have any merit.

(a) Plaintiff's contention that the defendants' motion was untimely.

The plaintiff, and not the defendants, was the original movant in this case. Wrenn filed his motion for summary judgment on March 23, 1989. The defendants filed their notice of cross-motion on August 16, 1989, returnable September 12, 1989.

Thus, the defendants were <u>not</u> the original movants in this lawsuit, and their papers in support of their cross-motion were timely filed. Accordingly, this basis for reconsideration is meritless.

(b) Plaintiff's contention that the successful candidate did not meet the minimum qualifications for the position.

In his original motion for summary judgment, the plaintiff did not proffer any evidence to substantiate his allegation that Daniel Brown was not qualified for the position he was offered with the V.A.M.C. Likewise, in the instant motion for reconsideration of plaintiff's case, Wrenn has

proffered no proof that Brown was unqualified for the job. Rather, he simply asserts that Brown was unqualified, without supplying this court with any documentation in support of this allegation.

Wrenn's speculations concerning Brown's qualifications for the job are insufficient grounds for a reconsideration of his complaint.

(c) Wrenn's claim that the defendant failed to articulate the "real reason" for not hiring the plaintiff.

As with Wrenn's other contentions, his claim that the defendants failed to articulate the "real reason" for not hiring plaintiff is without merit.

As discussed heretofore, Morphy did not hire Wrenn because Wrenn failed to state on his job application the reason for his being terminated from a previous job. As a result, Morphy felt that there were "significant gaps" in Wrenn's employment picture, and accordingly ruled out any further consideration of Wrenn's incomplete application.

This affidavit testimony is, according to Morphy, the "real reason" Wrenn was not hired, and

Wrenn's subjective belief that this is not so is no reason to reconsider his complaint.

Wrenn's motion for reconsideration does not provide this court with new facts, or any legitimate reasons, which merit a reconsideration of his complaint.

Accordingly:

1) Plaintiff's motion to file supplemental pleadings is denied as untimely and therefore moot; and

2) Plaintiff's motion for reconsideration of the court's order of October 12, 1989 granting defendants' cross-motion for summary judgment is denied as meritless.

IT IS SO ORDERED.

DATED: December 21, 1989
Syracuse, NY

/s/
Neal P. McCurn
Chief, U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CURTIS L. WRENN,

Plaintiff,

-v- 88-CV-872

RICHARD DROSKE, as Administrator to the Veterans Administration (as Chief and individually), MURRAY A. MORPHY, Director of the Veterans Administration Medical Center (as Chief and individually), PSYCHIATRY SERVICE VETERANS ADMINISTRATION MEDICAL CENTER, and the ATTORNEY GENERAL OF THE UNITED STATES DEPARTMENT OF JUSTICE,

Defendants.

APPEARANCES:

CURTIS L. WRENN, PRO SE
P.O. Box 1691
Albany, NY 12201

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United States Attorney
369 Federal Building
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Syracuse, NY 13260

PAULA RYAN CONAN
Assistant U.S. Attorney
369 Federal Building
100 S. Clinton Street
Syracuse, New York 13260

Attorneys for Defendants.

NEAL P. McCURN, C.J.

MEMORANDUM-DECISION AND ORDER

Plaintiff Curtis L. Wrenn brings this motion for partial summary judgment on his claims of race and age discrimination against defendants Richard Droske, administrator to the Veterans Administration, Murray A. Morphy, director of the Veterans Administration medical Center, and the Attorney General of the United States Department of Justice. All defendants cross-motion for summary judgment against plaintiff's entire complaint. For the reasons stated below, plaintiff's motion is denied, and the defendants' motion is granted.

BACKGROUND

In 1986, Curtis L. Wrenn applied for the position

of Administrative officer with the Psychiatry Service at the Veterans Administration medical Center (V.A.M.C.) in Buffalo, New York, a GS-9 position. This vacancy was included in an open, continuous announcement of vacancies issued for employees at the V.A.M.C. at Buffalo on April 1, 1986. On August 25, 1986, Murray A. Morphy, Chief of the Psychiatry Service at the V.A.M.C. and the official charged with filing the vacancy, received a certificate of eligible candidates from the personnel office of the V.A.M.C. The certificate listed five candidates. The plaintiff was not included. Morphy, finding none of the five candidates qualified, so informed the V.A.M.C. personnel department on September 8, 1986.

On December 10, 1986, the Syracuse Office of Personnel management provided Morphy with another certificate of transfer eligible employees. This certificate listed only one name, that of a 31-year old white male, Daniel J. Brown. Morphy immediately reviewed Brown's qualifications, conducted an interview, and determined that Brown was qualified

for the position.[1]

On December 11, 1986, Morphy received a list of five other transfer eligible candidates. This list contained the name of plaintiff Wrenn. Morphy scanned this new list to determine if there was a superior candidate. Seeing none, he conducted no further interviews, and hired the 31-year old Brown on December 19, 1986.

The plaintiff applied for this job on an SF-171 application. This form asks the applicant, inter alia, whether the applicant had been fired from any job within five years prior to the filing of the application. If the candidate had been fired, the applicant is to explain why he was fired on the application.[2] Wrenn stated on the application that he had been fired, but gave no reason for the

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[1] Affidavit of Murray A. Morphy ("Morphy Affidavit"), 5/31/89, para. 6.

[2] The application states:

> a conviction or a firing does not necessarily mean you cannot be appointed. The nature of the conviction or firing and how long ago it occurred is important. Give all the facts so that a decision can be made.

firing. as a result, even though the plaintiff was admittedly the highest rated applicant for the position, it was Morphy's judgment that the application "presented significant gaps in his employment picture", and he accordingly ruled out any further consideration of his application on that basis.[3]

Upon learning that the position for which Wrenn had applied had been filled by a younger, white male, Wrenn commenced the instant action against the defendants. Wrenn's claims against the defendants include racial and age discrimination; conspiracy between the defendants to violate Wrenn's constitutional rights; and a retaliation claim, wherein Wrenn states that the defendants did not hire him in retaliation for his previous filings with the Equal Employment Opportunity Commission ("E.E.O.C.").

In his affidavit, Morphy states that he was not aware of the plaintiff's race until the plaintiff filed an administrative complaint, and that any

[3] Morphy Affidavit, para. 9.

knowledge he had about Wrenn's age played no role in his hiring decision.[4]

An investigative report by the E.E.O.C. recommended a finding of race discrimination, but found no discrimination on the basis of age or reprisal.

DISCUSSION

1. Plaintiff's race discrimination claim.

A. ESTABLISHING A PRIMA FACIE CASE OF RACE DISCRIMINATION.

A prima facie case of racial discrimination under Title VII may be made by showing:

> (i) that [the plaintiff] belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Assuming, arguendo, that the plaintiff has met his burden concerning the first three elements, he

[4] Morphy Affidavit, para. 10.

has clearly not done so with the final element.

The position did not remain open not did the employer continue to seek applicants from persons of plaintiff's qualifications after Morphy had determined not to offer the position to the plaintiff. The position was filled by an applicant whom the employer had determined qualified upon consideration prior to the submission of plaintiff's application for consideration. Plaintiff does not dispute defendant's evidence that Morphy did not interview any candidates for the position after his interview of the successful candidate, Brown, nor is there any evidence that plaintiff was treated any differently than any other candidate on the third list of eligible candidates among which plaintiff was listed.

"Title VII does not diminish lawful traditional management prerogatives in choosing among qualified candidates." Wrenn v. Gould 808 F.2d 493, 502 (6th Cir. 1987), citing United Steelworkers of America v. Weber, 443 U.S. 193, 207 (1979). In the instant case, Morphy, exercising his managerial

prerogatives, had determined that the 31-year old was qualified for the job.[5] Wrenn's application was quickly scanned by Morphy to ascertain whether Wrenn, or any of the other applicants on this third list, was clearly superior to the 31-year old. Wrenn's application was incomplete[6], and therefore Morphy proceeded no further with it, and hired the 31-year old whom Morphy had interviewed previously.

[5] Morphy Affidavit, para. 5.

[6] Wrenn failed to explain, on the SF-171, why he was fired from his previous job. As discussed earlier, this gap in Wrenn's application made the application incomplete.

It therefore appears that the plaintiff has failed to prove an essential element in a prima facie case of race discrimination, i.e., that the position remained open and the employer continued to seek applicants.[7]

Assuming, arguendo, that the plaintiff has established a prima facie case of racial

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[7] Of course this court is not bound by the E.E.O.C. report which found that the plaintiff had been discriminated against on the basis of his race. As the defendant pointed out in oral argument, at the time Morphy was questioned by the E.E.O.C. about his hiring decision concerning Wrenn, Morphy had not had an opportunity to re-examine the SF-171 application Wrenn had filled out for the position. It was only after Morphy's interview with the E.E.O.C., that Morphy recalled that Wrenn's application, in particular, was given only a cursory review. had the E.E.O.C. been aware of this at the time it wrote its report, the E.E.O.C. may well not have made a finding of racial discrimination.

discrimination on the part of the defendants, the defendants must articulate a legitimate, nondiscriminatory reason, for rejecting the plaintiff.[8] As stated in U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983):

> By establishing a prima facie case, the plaintiff in a Title VII action creates a rebuttable "presumption that the employer unlawfully discriminated against" him. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 91981). See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To rebut this presumption, "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." Burdine, 450 U.S. at 255. In other words, the defendant must "produce[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." Id. at 254.

Aikens at 714. See also Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875 (1984).

The position Morphy was attempting to fill had

[8] Title VII was not enacted to prevent employers from making employment decisions based on legitimate criteria. As noted by the Supreme Court in Prince Waterhouse v. Hopkins, __ U.S. __, 109 S.Ct. 1775 (1989), "[t]itle VII eliminates certain bases for distinguishing among employees while otherwise preserving [an] employers freedom of choice [in making employment decisions] Id. at __, 109 S.Ct. at 1784-85.

been vacant for approximately eight months. Morphy had already interviewed a person whom he thought would be an appropriate person for the position. In scanning Wrenn's application, Morphy noticed that Wrenn did not explain why he was fired from his last job. As a result, Morphy determined that the plaintiff's application "had significant gaps in his employment picture."[9] Additionally, Morphy believed (as a result of the plaintiff's prior job experience and previous responsibilities with other jobs,) that Wrenn would have difficulty functioning within the limitations imposed in the position of a GS-9 Administrative Officer.[10] This was because the GS-9 position carried far less discretion and authority than plaintiff's previous jobs.

Confronted with these legitimate, non-discriminatory reasons for the alleged misconduct, it became Wrenn's duty to demonstrate that the employer's proffered reasons for its conduct were pretextual. DeCinto v. Westchester County Medical

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[9] Morphy Affidavit, para. 9.

[10] Id.

Center, 821 F.2d 111, 115 (2d Cir. 1987), Ritze v. City University of New York 703 F. Supp. 271, 280 (S.D.N.Y. 1989).

In the instant case, Wrenn has not provided this court with any evidence that indicates that these legitimate business reasons are, in any way pretextual. There is absolutely no evidence that the hiring official, Morphy, was even aware of plaintiff's race until the plaintiff filed his administrative complaint. Wrenn merely argues that he was more qualified for the position than was the applicant who was ultimately hired. Not only does this disregard the fact that Morphy had determined that the successful applicant was qualified for the position before Wrenn's incomplete application was ever looked at, but also it does not provide this court with any evidence that Morphy's articulated reasons for hiring Brown were motivated by a discriminatory reason.

In light of the foregoing, even if this court found that the plaintiff has made out a prima facie case of race discrimination, the plaintiff has not

offered sufficient evidence necessary to overcome defendants' motion for summary judgment. Nothing in the record indicates discriminatory animus, and Wrenn's evidence has not placed any of the material issues concerning defendants' proffered non-discriminatory reasons for hiring the 31-year old, and not Wrenn, into genuine dispute. In such cases, summary judgment is appropriate. See Mays v. Chicago Sun-Times, 865 F.2d 134, 137 (7th Cir. 1989), Gibbs v. Consolidated Edison Co. of New York, Inc. 714 F.Supp. 85, 93 (S.D.N.Y. 1989), Francois v. Office of Mental health of State of N.Y., 715 F.Supp. 69,74 9S.D.N.Y. 1989), Ritze 703 F.Supp. at 280. See also O'Keefe v. Niagara Mohawk Power Corp., 714 F. Supp. 622, 630 (N.D.N.Y. 1989) (McCurn, J.). Therefore, the defendants' motion for summary judgment on plaintiff's race discrimination claim is granted.

2. Plaintiff's age discrimination claim.

The plaintiff has also alleged that the defendants have discriminated against Wrenn on the basis of Wrenn's age.

29 U.S.C. Subsection 623(a) provides, in pertinent part,:

> (a) Employer Practices. It shall be unlawful for an employer - (1) to fail or refuse to hire or to discharge any individual...because of such individual's age.[11]

In discussing the elements in a prima facie claim of age discrimination, the second circuit, in Benjamin v. United Merchants and Manufactures, Inc., 873 F.2d 41 (2d Cir. 1989) held that the plaintiff must demonstrate that he was:

> (1) a member of the protected class, (2) qualified for his job, (3) fired, and (4) replaced by a younger individual, and that, therefore, his discharge occurred under circumstances giving rise to an inference of discrimination on account of age.

Id. at 42 (citations omitted).

This standard is more flexible than the standard used for racial discrimination claims. As a result, courts have treated the establishment of a prima facie case of age discrimination somewhat more liberally than one of race discrimination, if only

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[11] This section applies to persons at least forty, but less than seventy, years old. 29 U.S.C. Subsection 631. Mr. Wrenn is fifty-four years old.

because there are alternative ways of establishing age discrimination claims.

For example, in Montana v. First Federal Savings and Loan of Rochester 869 F.2d 100 (2d Cir. 1989), the second circuit reversed a district court's granting of summary judgment in an age discrimination claim. in explaining its rationale in the case of Stanojev v. Ebasco Services, Inc. 643 f.2d 914 (2d Cir. 1981), the Montana court stated that:

> even though the plaintiff, whose job was eliminated upon his discharge, failed to show that a new employee took over his job after discharge or even that the position was left open, the McDonnell Douglas formula is not the only means of raising an inference of age discrimination. As [an] alternative[], the plaintiff [is] permitted to show direct evidence, statistical evidence, or circumstantial evidence supporting an inference of age discrimination.

Montana at 104.

Assuming, arguendo, that the plaintiff has established a prima facie case of age discrimination, as with title VII claims, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the

employee's rejection.'" Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

As stated in Montana, statistics can be used to support an inference of age discrimination. Likewise, they can be used to rebut such an inference. In the administrative record compiled by the V.A. here, the statistics demonstrate that 28 of the 42 employees of the V.A.M.C. in Buffalo are older than 40; strong evidence that the employer is not discriminating against people on the basis of age. Further, Morphy has articulated other legitimate, non-discriminatory reasons, for rejecting Wrenn's application, discussed supra.

As with his race discrimination claim, the plaintiff has not offered sufficient evidence necessary to overcome defendants' motion for summary judgment concerning his age discrimination claim. Nothing in the record indicates discriminatory animus concerning people over the age of forty, and Wrenn's evidence has not placed any of the material issues concerning defendants' proffered non-discriminatory reasons for hiring the 31-year old,

and not Wrenn, into genuine dispute.

The administrative record concluded that no age discrimination took place. Additionally, Morphy has articulated legitimate reasons for not hiring Wrenn. Finally, the employment statistics of the V.A.M.C. which demonstrate that roughly two-thirds of the V.A.M.C.'s employees are over age 40. all of these factors prove, to the satisfaction of this court, that the defendants did not discriminate against Wrenn on the basis of age.

Therefore, the defendants' cross-motion for summary judgment concerning plaintiff's age discrimination claim is hereby granted.

3. Plaintiff's conspiracy claim.

Paragraph 22 of Wrenn's complaint alleges that

> [t]he defendants Va and Justice have conspired to prevent plaintiff's employment in his chosen profession of hospital and health care administration by, among other things, aiding and abetting public and private employers who have discriminated against him, and by concerted action to defame, libel, slander and stigmatize the plaintiff by making false and misleading statements to others about him. In an attempt to cover up their unlawful activities, the defendants have denied information to the plaintiff under the FOIA

(5 USC 552).

42 U.S.C. Subsection 1985(3) makes is unlawful for two or more persons to conspire to deprive any person of the equal protection of the laws, or of the equal privileges and immunities under the laws. Thus, read liberally, the plaintiff may be alleging that the V.A. and the Justice Department conspired to deprive Wrenn of equal protection under the law. Assuming that the plaintiff has successfully pled such a cause of action against the defendants, this court must determine whether the plaintiff has alleged facts sufficient to prove this claim.

Judge Munson of the Northern District of new York has recently analyzed a different Subsection 1985 3) claim alleged by this plaintiff. In his order, Judge Munson stated:

> To state a cause of action under Subsection 1985(3), plaintiff must allege "(1) a conspiracy; (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States. Traggis v.

St. Barbara's Greek Orthodox Church, 851 F.2d 584, 586-87 (2d Cir. 1988) (citations omitted).

Judge Munson continued by finding:

> Under Subsection 1985(3), a conspiracy exists if there is an agreement between the alleged conspirators "to inflect a wrong against or injury upon another ..." Lenard v. Argento, 669 f.2d 874, 882 (7th Cir. 1983), cert. denied, 464 U.S. 815 (1983). The agreement need not be express, but can be implied form the 1107 (D.Mass. 1986). Nonetheless, there must be evidence of discriminatory animus to make out a claim under Subsection 1985(3). Griffin v. Breckenridge, 403 U.s. 88, 102, & n.10 (1970); Lenard, 699 f.2d at 883. Given the tenor of plaintiff's complaint, the animus required for his Subsection 1985(3) claim would be racially discriminatory animus.

Wrenn v. Board of Directors, N.D.N.Y. 85-CV-1096 (February 21, 1989), at 35-36.

In the instant case, there is no evidence that Morphy, or any of the defendants, had a racial animus concerning blacks. Nor was this court presented with any evidence that any of the defendants have any animus concerning people over the age of forth.

As this court has stated above, the decision not to hire the plaintiff was based on Morphy's sound business judgment and discretion, and not on

any alleged animus towards either blacks or people over the age of forty. As a result, the defendant's cross-motion for summary judgment concerning a conspiracy on the part of the defendants to deprive Wrenn of any rights guaranteed by 42 U.S.C. Subsection 1985(3) is granted.

4. Plaintiff retaliation claim.

The plaintiff also contends that the defendants discriminated against him in retaliation for his filing discrimination charges with the E.E.O.C. and for his previous lawsuits in federal courts alleging unlawful employment discrimination.

To prove a claim of retaliation, the plaintiff must prove (1) that the plaintiff was engaged in protected activities; (2) that the employer was aware of the protected activities; and (3) as a result, the plaintiff suffered adverse employment decisions. Davis v. State University of New York, 802 F.2d 638, 642 (2d Cir. 1986).

Here, the administrative record found that the plaintiff's claim of reprisal was not viable because Wrenn had not engaged in Title VII protected

activities against the V.A. prior to this complaint. Even if the plaintiff had, in fact, engaged in such activities, the administrative record found, and this court has held today, that the defendants have demonstrated non-discriminatory and legitimate business reasons for not hiring the plaintiff.

The plaintiff has not offered any evidence in support of his allegation of retaliation on the part of the defendants. There being no evidence of any retaliation concerning the defendants, this court may properly grant defendants' motion for summary judgment on the retaliation claim. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

CONCLUSION

In light of the foregoing, plaintiff's motion for partial summary judgment is denied, and defendants' cross-motion for summary judgment on plaintiff's complaint is granted.

IT IS SO ORDERED.

DATED: October 12, 1989
Syracuse, New York

/s/Neal P. McCurn
Chief, U.S. District Judge

APPENDIX H

Medical Center
3495 Bailey Ave.
Buffalo, NY 14215

Veterans
Administration

December 30, 1986

In Reply Refer to: 528/05
JAK/mak

Curtis L. Wrenn
R.D. 1, Box 218
Nassau, NY 12123

Dear Mr. Wrenn:

We carefully considered your application for the position of Administrative Officer GS-9, about which you recently expressed an interest; however, another candidate was selected.

Your application has been returned to the Syracuse Area Office so that you may be considered for future vacancies.

Your interest in employment with the Veterans Administration is appreciated.

Sincerely,

/s/Signature illegible
R.A. Westfall
Chief, Personnel Service

APPENDIX I

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
CERTIFICATED OF ELIGIBLES

(Continuation Sheet)

Action	Rating	Vet	Name
NN	105	TP	WRENN, CURTIS L.*
NN	97		
NN	89		
NN	82		
NN	79	TP	
NN	78		

ISSUED BY: M. GLESSING

*Position to be filled by transfer eligible

THIS CERTIFICATE IS VALID ONLY FOR THE POSITION, GRADE & DUTY LOCATION SHOWN ABOVE.

ADMINISTRATIVE OFFICER, PSYCHIATRY SERVICE

INTRODUCTION

The incumbent provides staff support and assistance to the chief, Psychiatry Service, with primary emphasis on administrative assistant duties. THis staff support relieves the Cheif from Many administrative details so that the Chief's time can be devoted to professional matters related to patient care, research and education.

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

The duties of this position would include 6 general categories with some intrinsic overlap:

(1) Program Management and Administration

The day-to-day administrative responsibilities for the operation and coordination of programs offered by the Psychiatry Service for the inpatient service, the clinics, the partial hospitalization program; with the direction of the Chief of the Service, would develop, compose and

update short and long-range plans; he would develop protocols for modification of administrative procedures, survey current policies and procedures and propose changes which, with the approval of the professional staff of the Department, might then be implemented; survey safety standards; prepare and edit reports; assist the Chief of Psychiatry and the Coordinator for Graduate Education in the coordination of educational activities within the service, within the Center and with the University; review and interpret new regulations; initiate appropriate action to problems identified by VAMC administration; develop, implement and maintain an effective safety and disaster program; insure compliance with regulations, etc.

(2) Resource Utilization

The individual would survey the utilization of existing resources including utilization of non-professional personnel and space and

budget; would accurately maintain the statistical reports of the Psychiatry Service; review supplies and equipment charged to the Psychiatry Service, insure accuracy of current inventory; would monitor and assist in the preparation of the Service budget, and analyze expenditures and investigate equipment needs; conduct annual cost benefit analyses of assigned FEE in conjunction with local reporting requirements including such issues as personnel utilization, work schedules overtime and leave usage. he would participate in the administrative and professional meetings of the Service, maintain records or their deliberations in compliance with standards and ensure effective and efficient coordination of resource utilization.

(3) Program Evaluation and Implementation

He would be active in the Utilization Review program and the Quality Assurance programs; would conduct management studies to evaluate

the efficiency of operations within the Service with particular emphasis on the non-professional group; implement standards set forth by VACO, the Mental health Council, local hospital administration and the Chief of Psychiatry Service; coordinate the Quality Assurance program of the Service with emphasis on problem identification, solution, monitoring and record-keeping; assist in the preparation for the JCAH and SERP standard program audits; consistent with Utilization Review and Quality Assurance; would facilitate the development and implementation of program evaluation within each section of the psychiatry Service.

(4) Personnel Management

Maintain a close relationship with Personnel Service; write position descriptions and performance requirements affecting employees of the Psychiatry Service, monitor personnel actions for the 35 employees of the Service, the 14 consulting and attending physicians

and the 10 residents who rotate through the Service annually; insure the timely submission of annual Personnel Service performance evaluations and take appropriate action after completion of performance appraisals; implement and direct the Services's affirmative action goals; develop encourage and monitor meaningful in-service training procedures for the staff of the Psychiatry Service and assure consistence with Medical Center and VA regulations and policies; provide orientation for all new employees of the Service; assist the Chief in the process of recruitment of professional personnel; insure that the top 5% of the qualified staff are recommended for higher level recognition annually; monitor leave usage to insure proper coverage and investigate possible abuses; informally investigate employee complaints.

(5) External Relations

The individual would process VA

communications and assist in the coordination of program matters with other mental health services in the community and with counterparts in the School of Medicine concerning the affiliation agreement, and participate with the Chief of the Service in the MEDIPP planning and implementation of District-wide psychiatric programs planning; coordinate day-to-day matters with other clinical and administrative services in the Medical Center, provide technical guidance to higher level management in a timely and correct manner; maintain contact with outside organizations by which the community offers its resource to the rehabilitation of our patients.

(6) Supervision

The incumbent supervises and coordinates the functions of the non-clinical personnel of the Psychiatry Service.

II. BACKGROUND REQUIREMENT

Background requirements for this position would

include: (1) a knowledge of principles, practices and techniques of management of general, and hospital and mental health service administration in particular--the incumbent should have a Master's Degree or its equivalent in health Care Administration and a Bachelor's Degree and clinical experience in Social Work, Nursing or Psychology; (2) knowledge of oral and written communication techniques; (3) knowledge of basic decision-making and problem-solving skills; (4) knowledge of VA requirements and Medical District 2 policies and plans and their impact on psychiatric services, and (5), knowledge of working relationships among professional staff, students, the University and the hospital. The incumbent should have a background of management activities including resource management, above-average ability in oral and written communication skills, in ability to motivate others, experience in Veterans Administration programs and in public mental health delivery systems.

III. SUPERVISORY CONTROLS

The supervisory relationship would be as follows:

The Chief of Psychiatry Service would serve as the incumbent's supervisor on all technical and administrative matters. The work would be reviewed regularly through personal contact the the Chief. Guidelines would include all VA and Psychiatry Service practices and procedures. The employee would work independently but though the Cnief of Psychiatry, would coordinate actions with other administrative staff of the Medical Center, in selected cases, with other clinical and support services and with representatives of the Department of Psychiatry in the School of Medicine of the State University of New York at Buffalo.

1. Full name, race and age?

   Murray A. Morphy, M.D.
   Caucasian; 40 years.

2. Name and location of agency and unit where you work?

   Psychiatry Service, Buffalo VAMC

3. What was your Position Title, Series and Grade at the time the position in question was filled?

   Chief, Psychiatry Service

4. a. How long have you been employed with the VA?

   10 yrs, 10 months

   b. How long have you been employed with the federal government?

   10 yrs, 10 months

5. Do you know the complainant, Mr. Wrenn? If so, in what capacity?

   No

6. As the selecting official for the position in question, were normal operating procedures followed? Explain what procedures were followed. Yes. A transfer eligible applicant was accepted for the position. Resumes

submitted from the VA Employment office in Syracuse were briefly reviewed but no candidates were interviewed. Resumes from Medical Center applicants were also briefly reviewed and again the decision was not to conduct any interviews as per standard VA policy.

7. How was the vacancy announced?

Refer to Personnel Service.

8. What were the qualification requirements for the position in question? Did all of the applicants meet these standards? Explain.

Refer to Personnel Service.

9. What evaluation criteria were used in filling the position? Who determined what the evaluation criteria would be? Were they consistently applied? What rating guidelines were used? What was the summary evaluation of each applicant? How were the applicants rated and ranked?

Refer to Personnel Service. In addition, Psychiatry Service sought an individual with an educational background at the Bachelor level or above, who had previous experience in an administrative or coordinating capacity and who had personal experience with office management including the utilization of computer based technologies such as word processing, spread sheet use for report generation and data analysis using such programs as dBase II.

To the best of my recollection all candidates submitted through civil service review met the educational and administrative experience basic

requirements. No candidate however appeared to match the precise character of administrative experience as well as the transfer eligible applicant, Mr. Daniel Brown, who had been working in a nearly identical capacity for an Air Force Reserve Unit at Griffiths AF Base. Mr. Brown also possesses the required knowledge and skill in the computer related technologies referred to above. The resumes of the civil service candidates did not suggest that any of these individuals possessed similar knowledge and skills.

While a numerically based ranking system was not developed to evaluate candidates for this position it appeared from a review of the available resumes that no other candidate possessed qualifications that were greater than or equal to Mr. Brown's, and on this basis I decided not to conduct any further interviews.

10. Were any of the applicants interviewed for the position in question? If so, by whom? How would you characterize the interview?

Only the transfer eligible candidate was interviewed. The interview was a standard assessment of the applicant's background, skills, and interest in the position. Dr. Morphy completed the interview.

11. What are normal operating procedures with respect to interviewing qualified applicants? Were you under any obligation imposed by the regulations to interview any or all applicants?

For each separate category of applicant either all candidates in that applicant category must be interviewed or none. That was the procedure followed in this case.

12. Was more than one person involved in the selection, interview and evaluation process? If so, who? Please give full details.

No.

13. Did you review the qualifications of the applicants? If so, who was better qualified for the position in question, Mr. Brown or Mr. Wrenn? Explain.

I do not recall the qualifications of Mr. Wrenn. Mr. Brown's qualifications were considered optimal. As outlined in my response to Question #9 Mr. Brown had a satisfactory educational background and had been employed in a position that appeared nearly identical in terms of duties to the Administrative Officer position here at the BVAMC Psychiatry Service. in his role at the Griffiths AF Base Air Force Reserve Unit he had been administratively responsible for the management of an office. This required coordinating and supporting the activities of several individuals including the command of the Unit, generating reports, composing correspondence and analyzing skillful in utilization of such computer based technologies as word processing, spread sheet analysis, and manipulation of data bases..

Since I do not recall the specific qualifications of Mr. Wrenn it is difficult for me to precisely compare them to those of Mr. Brown. It did appear however that mr. Brown's background made him an ideal candidate for our position.

14. How many blacks and individuals over 40 have you hired in the past two years? how many blacks and individuals over 40 have you had an opportunity to hire?

Two blacks and 6 individuals over 40 years of age have been hired by Psychiatry Service during the past two years. Since I have been personally responsible for hiring of Psychiatry Service staff beginning in april of 1986 I have hired one black and 4 individuals over the age of 40. During this time there was only one opportunity to hire a black applicant and this person was selected.

15. Do you believe that Mr. Wrenn was discriminated against on the basis of his age, race, or any other bases? Pleas explain.

No.

16. Have you taken any reprisal action against Mr. Wrenn? If so, please explain. When Mr. Wrenn was not selected for the position in question, was it a reprisal action?

No. I have never met Mr. Wrenn and have no idea of who or where he is.

I have not taken reprisal against anyone.

17. Have any complaints of discrimination been filed against you or your unit in the past two years? Are there any currently pending? If so, are any of the complaints related to this complaint? Explain.

One complaint has been filed which was unsupported on review. This is not related to this current complaint.

18. Is there anyone that you feel that I should see that might have relevant information with respect to this complaint?

No.

19. Is there anything that you would like to add that I have failed to ask that is relevant to this investigation?

No.

I have read this statement, consisting of 5 pages, and it is true and complete to the best of my knowledge and belief. I have made and initialed any corrections, additions or deletions, and I have initialed each page of this affidavit. I understand that the information which I have given in this affidavit is to be considered confidential, but it may be shown to persons officially required to review it.

/s/Murray Morphy
(To be signed only before a Notary Public or the Investigator)

Subscribed and (sworn to)

(affirmed) before me at

Buffalo, NY on this 19th

day of November, 1987

/S/Laura M. Holt
(Investigator's Signature or Notary Public's Signature and Seal)

APPENDIX L
Page 1 of 10 Pages

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CURTIS L. WRENN,
Plaintiff

vs.

ADMINISTRATOR,
VETERANS ADMINISTRATION, ET AL.
Defendants

AFFIDAVIT

Case No.83-CV-272

STATE OF NEW YORK)
COUNTY OF ERIE) S S . . .

MURRAY A. MORPHY, being duly sworn deposes and says:

1. I am a licensed physician employed by the United States Department of Veteran Affairs, and at all times relevant to the matters at issue in the above stated action was and still am the chief of the Psychiatry Service at the V.A. Medical Center at Buffalo, New York.

2. In my capacity as chief of the Psychiatry Service it is my responsibility to review the qualifications of candidates for employment with my

service, and to select individuals to fill job vacancies in my service from among the qualified candidates. Accordingly, I was the official who mad the selection of the successful candidate for the position of Administrative Office, GS-9, in the Psychiatry Service at V.A. Medical Center, Buffalo, New York on December 19, 1986 for which the Plaintiff, CURTIS L. WRENN, claims non-selection in this action due to prohibited discrimination.

3. This affidavit is given in order to chronologically set forth the facts surrounding my selection of the successful candidate for the position at issue, and the facts of the consideration given to the Plaintiff as an applicant for the position.

4. The vacancy for the position of Administrative Office, GS-9, with the Psychiatry Service was included in an open continuous announcement of vacancies issued for employees at the V.a. Medical Center at Buffalo, New York on April 1, 1986.

5. On August 15, 1986 a certificate was

forwarded to me as selecting official for the position from the Medical Center personnel office advising of the names of five candidates that had applied for the position from within the facility. I reviewed the background and qualification of these five candidates, but it was my opinion that none of the candidates were sufficiently knowledgeable in all areas necessary to work in the position. Accordingly, on September 8, 1986 I returned the certificate to the personnel office without having made a selection, requesting action seeking "outside or other recruitment" by checking that action on the certificate, with my notation of "desire better qualified applicants".

6. On December 10, 1986 the personnel office transmitted to me a certificate of transfer eligible employee candidates for the position which had been obtained from the Office of personnel Management in Syracuse, New York, pursuant to my request of September 8, 1986. The certificate contained the name of only one individual, a white male of 31 years of age. Because of the period of time that

had passed from the initial announcement of the vacancy to that time, I was most anxious to see that the vacancy was filled with all possible speed. I accordingly immediately reviewed the transfer eligible candidate's qualifications, and found that same were compatible with the duties of the vacant position. I then immediately arranged and conducted an interview with the transfer eligible applicant. the interview confirmed my judgement that the duties being performed by this applicant in his then-current position at Griffith Air Force Base in an administrative capacity were nearly identical to those involved in the vacant position. At the end of the interview it was my judgement that the transfer eligible applicant would be an appropriate selectee for the position.

7. The personnel office had within days of the referral of the certificate of transfer eligible candidates also provided me with a certificate of eligible applicants which was transmitted by the Office of Personnel Management on or about December 11, 1985. While I had judged the transfer eligible

candidate to be an appropriate selectee. I nonetheless elected to briefly review the qualifications of the five candidates listed on the second O.P.M. certificate to determine if one appeared to be superior to the transfer eligible candidate. From that review I could not determine that any of the five were clearly superior, and elected to conduct no interviews of any of those candidates. The transfer eligible was accordingly selected to fill the position on December 19, 1986.

8. Among the candidates listed on the December 11, 1986 certificate was the Plaintiff, whose 105 point rating, including a 5 point veterans preference, made him the highest rated of those candidates.

9. approximately one month prior to the filing of this action, in relation to preparations for an administrative hearing over the Plaintiff's administrative complaint over non-selection, I was interviewed by Department counsel in preparation for giving testimony at such hearing. At the time, I could provide no immediate recollection of my

considerations in the review of the Plaintiff's qualification statement due to the passage of time. I was then asked to review the qualification itself, and such review did serve to refresh my recollection of my concerns. The SF-171 requires a listing of job experience, and contains a number of standard questions, including that of whether the applicant had been fired from any job within the five years prior to the filing of the application. The form further provides the opportunity to give narrative regarding any of the answers to these standard questions. Plaintiff's SF-171 indicated a response of "yes" to the question of whether he had been fired from a job within the previous five, but set forth no narrative information in explanation of this answer. Plaintiff's work experience indicated positions in upper level hospital management in the private sector. My consideration of this information in December of 1986 had led me to pass over the Plaintiff's application with only cursory review, as I could not determine why an individual who had been employed in the private sector in

positions of apparently far more authority and pay than that involved in the GS-9 level position at issue would be seeking such a position. It was my judgement that an individual of Plaintiff's stated level of experience in hospital administration would be seeking such a position. It was my judgment that an individual of Plaintiff's stated level of experience in hospital administration would potentially have difficulty functioning within the limitations imposed in the position of a GS-9 Administrative Officer, as the position carried far less discretion and authority than positions previously held by the Plaintiff. I was more concerned with the unexplained "yes" answer to the question concerning his being fired from a job within the previous five year period. some narrative identifying the employer involved and the reason for the firing would be expected in conjunction with that response, especially from an individual who had held high level management positions and would know the significance of an unexplained firing would have in consideration of an

applicant for employment. Yet no such narrative was included. Therefore, despite the fact that the Plaintiff was the highest rated applicant on the certificate under consideration, it was my judgement that his SF-171 presented significant gaps in his employment picture, and I accordingly ruled out any further consideration of his application on that basis.

10. The Plaintiff has alleged that his non-selection for the position at issue was the result of prohibited discrimination on account of his race (black) and age. While I do not recall having noted Plaintiff's age at the time of my review of his SF-171 in December of 1986, his date of birth of February 14, 1930 was listed on the face of same and I might have noted same from that review. The fact of Plaintiff's age did not, however, play any part in my determination not to interview him or any of the other eligible candidates from the O.P.M. certificate of December 11, 1986. RElative to the issue of his race, I was unaware of that factor until Plaintiff had filed an administrative

complaint of prohibited discrimination subsequent to the selection. In the aforesaid interview with Department counsel, my attention was directed to a reference in a typewritten attachment to the SF-171 relative to description of Plaintiff's duties while employed at the University of maryland Hospital indicating he was the "...highest ranking black" at that facility. This statement had not been noted by me at the time of my review of the SF-171 of the Plaintiff and other candidates on the certificate in question, my review having been cursory and solely for purposes of determining whether any of the five listed candidates appeared to be clearly superior to the transfer eligible candidate.

11. It is submitted that my determination not to interview the Plaintiff for the vacancy in question was in no way related to consideration of race or age, but was due to business related judgment concerning the issues set forth in Paragraph 9 of this affidavit, supra. As it was my judgment that none of the candidates listed on the certificate was clearly superior to the transfer eligible candidate

who had been interviewed previous to my review of the qualification statement of those candidates, and was judged to be an acceptable selectee by me, no interviews were afforded to any of those five candidates. The Plaintiff was accordingly afforded no treatment in the selection process that was different from that afforded to any of the persons listed upon the certificate upon which his name was included in relation to this vacancy by me.

/s/Murray A. Morphy

Sworn to before me this

31st day of May, 1989.

/s/James F. Mietlicki

Notary Public, State of New York
Qualified in Erie County
My Commission Expires 2-28, 1990

APPENDIX M
Page 1 of 2 Pages

United States
Office of
Personnel Management

Syracuse Area Office
James M. Hanley
Federal Building
100 S. Clinton St.
Syracuse, NY 13260

In Reply Refer To:
PSS:LSE:po

NOV 22 1989

Mr. Curtis L. Wrenn
Post Office Box 20
Fort Drum, NY 13603

Dear Mr. Wrenn:

This is in reply to your request for information under the Freedom of Information Act request dated November 4, 1989 concerning the position of Administrative Officer, GS-341-9, with the Veterans Administration Medical Center in Buffalo, NY. You specifically requested a complete copy of your application and all information or documents provided the employing agency concerning your application and/or qualifications. As you are aware applications for mid and senior level positions are retained for 90 days only. The document which was

provided the employer concerning your qualifications was the SF-171. Since you submitted your application in 1986 it has been destroyed.

Your request for a copy of all rules, regulations, and policies concerning hiring transfer eligibles are contained in Title 5 of the Code of Federal Regulations Part 315 - Career-Career Conditional Employment. This document is available for review by contacting your servicing personnel office or in most public libraries. The information required by an applicant on the SF-171 concerning post employment firing was contained in our letter of October 13, 1989.

We trust that the above information is responsive to the issues raise in your letter.

Sincerely,

/s/Thomas F. Frawley
Area Manager

APPENDIX N

Answer Items 27 through 34 by placing an "x" in the proper column.	YES	NO
27. Are you a citizen of the United States?.....	X	
If "NO" give country of which you are a citizen.		

NOTE: A conviction or a firing does not necessarily mean you cannot be appointed. The nature of the conviction or firing and how long ago it occurred is important. Give all the facts so that a decision can be made.

28. Within the last five years have you been fired from any job for any reason?.....	X	
29. Within the last five years have you quit a job after being notified that you would be fired?.....		X

If your answer to 28 or 29 above is "YES" give details in Item 35. Show the name and address (including Zip Code) of employers, approximate date, and reasons in each case. This information should agree with your answers in Item 21, Experience.

30. A. Have you ever been convicted, forfeited collateral, or are you now under charges for any felony or any firearms or explosives offense against the law? (A felony is defined as any offense punishable by imprisonment for a term exceeding one year, but does		

not include any offense classified as a misdemeanor under the laws of of a State and punishable by a term of imprisonment of two years or less.)..... X

B. During the past seven years have you been convicted, imprisoned, on probation or parole or forfeited collateral, or are you now under charges for any offense against the law not included in A, above..... X

NOTE: When answering A and B above, you may omit: (1) traffic fines for which you paid a fine of $50.00 or less; (2) any offense committed before your 18th birthday which was finally adjudicated in a juvenile court or under a youth offender law; (3) any conviction the record of which has been expunged under Federal or State law; and (4) any conviction set aside under the Federal Youth Corrections Act or similar State authority.

31. While in the military service were you ever convicted by a general court martial?..... X

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32. Does the United States Government employ in a civilian capacity or as a member of the Armed Forces any relative of yours (by blood or marriage)?..... X

33. Do you live with, or within the past 12 months have you lived with any of these relatives who are employed in a civilian capacity?..... X

If your answer to 32 is "YES" give in Item 35 for such relatives (1)name; (2) present address; (3) relationship; (4) department, agency, or branch of the armed forces.
If you answer to 33 is "YES", also give the kind of appointment held by the relative(s) you live with or have lived with within the past 12 months.

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34. Do your receive, or do you have pending, application for retirement retainer pay, pension, or other compensation based on military, Federal civilian, or District of Columbus Government service?.....X
If your answer to 34 is "YES give details in Item 35

Your Statement cannot be processed until you have answered all questions, including Items 27 through 34 above. Be sure you have placed and "X" to the left of EVERY marker () above, either in the "YES" or "NO" column.

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35 Item Number	Space for detailed answer. Indicate Item number to which the answers apply.
32	Three sons (Curtis L., Joseph B.B., and Michael) and one daughter (Shirley F.) in the U. S. Army.
34	Retired CW3 (USAR). Personnel Technician. Voluntary after 20 years.
24	Honors: Class President, University of Alabama Military Awards: MSM, BSM(2), ACM(3) GCM(3), Fellowships: Fellow, American Academy

of Medical Administrators.

28 Fired 9 Oct 85 by Whitney M. Young, Jr. Health Center, Inc. and the U.S. Department of Health and Human Services in retaliation for my firing a white male for unsatisfactory work performance. A lawsuit (Title VII and breach of contract) is now pending in the U.S. District Court, Albany, NY as case 85-CV-1096.

ATTENTION - THIS STATEMENT MUST BE SIGNED

A false answer to any question in this Statement may be grounds for not employing you, or for dismissing you after you begin work, and may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 19001). all the information you give will be considered in reviewing your Statement.

AUTHORITY FOR RELEASE OF INFORMATION

I have completed this Statement with the knowledge and understanding that any or all Items contained herein may be subject to investigation prescribed by Law or Presidential directive and I consent to the release of information concerning my capacity and fitness by employers, educational institutions, law enforcement agencies and other individuals and agencies, to duly accredited investigators, Personnel Staffing Specialists, and other authorized employees of the Federal Government for that purpose.

CERTIFICATION

I certify that all of the statements made by me are true, complete, and correct to the best of my knowledge and belief, and are made in good faith /s/Curtis L. Wrenn